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No. 06-765

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In The

Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

DEL E. ROMERO and MATTHEW GUTIERREZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION OF RESPONDENT MATTHEW GUTIERREZ

FRANK A. DEMOLLI
Counsel of Record
JANA WERNER
PUEBLO OF POJOAQUE
LEGAL DEPARTMENT
58 Cities of Gold Road
Santa Fe, NM 87506
(505) 455-2272

PAUL G. MOOREHEAD
BRIAN L. GUNN
Of Counsel
DRINKER BIDDLE & REATH LLP
1301 K. Street N.W.,
Suite 900 East
Washington, D.C. 20005
(202) 230-5000

Attorneys for Respondent Matthew Gutierrez

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, in the aftermath of congressional action clarifying the allocation of the competing criminal jurisdictional interests of the Indian Pueblos of New Mexico, the State of New Mexico, and the United States, over Indians within the Pueblos, there is any case or issue warranting Court review.*

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* Petitioner frames the question as follows:

I. Whether the New Mexico Supreme Court misinterpreted and misapplied the exclusive Federal definition of a dependent Indian community in 18 U.S.C. § 1151(b) and interpreted in the unanimous opinion, *Alaska v. Native Vill. of Venetie Tribal Gov't,* 522 U.S. 529 (1998), for purposes of determining Federal criminal jurisdiction when the New Mexico Supreme concluded:

> A. Alleged crimes committed by an Indian in private, fee simple lands within the original exterior boundaries of a Pueblo land grant in which all Indian and United States title had been extinguished pursuant to the Pueblo Lands Act of 1924 satisfied the Federal set-aside requirement of land for the use and enjoyment of an Indian community; and
>
> B. The Federal superintendence requirement of *Venetie* was satisfied because the alleged crimes occurred on lands located within the original exterior boundaries of Pueblo land grants event though no evidence of Federal superintendence over the land was established?

II. Whether the New Mexico Supreme Court created an intolerable jurisdictional quagmire where no Federal or state criminal jurisdiction may be invoked because certain lands within the original exterior boundaries of a Pueblo land grant are effectively prosecution-free zones?

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The New Mexico Supreme Court issued its opinion in the consolidated appeal, *State v. Romero*, 142 P.3d 887 (N.M. 2006), reversing the decisions of the New Mexico Court of Appeals in *State v. Gutierrez*, No. 24,731, slip. op. (N.M. Ct. App. May 20, 2004), and *State v. Romero*, 84 P.3d 670 (N.M. Ct. App. 2004).

STATUTES OR OTHER PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Constitution of the United States, Article VI, Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Pueblo Land Act Amendments of 2005, 119 Stat. 2573:

> An Act to amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. INDIAN PUEBLO LAND ACT AMENDMENTS.
>
> The Act of June 7, 1924 (43 Stat. 636, chapter 331), is amended by adding at the end of the following:
>
> > "SEC. 20. CRIMINAL JURISDICTION.
> >
> > "(a) IN GENERAL. – Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.
> >
> > "(b) JURISDICTION OF THE PUEBLO. – The Pueblo has jurisdiction, as an act of the

Pueblos' inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian as defined in title 25, sections 1301(2) and 1301(4), or by any other Indian-owned entity.

"(c) JURISDICTION OF THE UNITED STATES. – The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.

"(d) JURISDICTION OF THE STATE OF NEW MEXICO. – The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of a Pueblo or an Indian as defined in title 25, Sections 1301(2) and 1301(4), which offense is not subject to the jurisdiction of the Unites States."

STATEMENT OF THE CASE

State of New Mexico vs. Matthew Gutierrez

Matthew Gutierrez[1] is an enrolled member of the Pueblo of Pojoaque and was arrested by the Pojoaque

[1] Respondent Matthew Gutierrez is not to be confused with Jose Gutierrez, an enrolled member of the Pueblo of Santa Clara, whose motions to dismiss a Federal criminal indictment against him were, first, denied, by a Federal magistrate, *United States v. Gutierrez*, Cr. No. 00-M-375, Dkt. No. 14 (D. N.M. June 21, 2000), and subsequently granted by the United States District Court for the District of New

(Continued on following page)

Tribal Police following a stabbing incident in August 2002. All of the alleged crimes occurred on fee simple land located within the original exterior boundaries of the Pueblo of Pojoaque land grant.

Upon notification of the alleged crime, the Pueblo of Pojoaque Tribal Police contacted the Federal Bureau of Indian Affairs' Tribal Police. After investigation, the tribal law enforcement officials prosecuted the case in the Pueblo of Pojoaque Tribal Court ("Tribal Court") and also referred the case to the U.S. Attorney for prosecution.

Gutierrez was arraigned in Tribal Court and charged with multiple violations of the Pojoaque Tribal Law and Order Code. Gutierrez did not contest the criminal jurisdiction of the Tribal Court. The U.S. Attorney for the District of New Mexico declined to prosecute because of a decision by a Federal magistrate concerning criminal jurisdiction within the Pueblos.

After the Tribal prosecution was commenced, the State of New Mexico indicted Gutierrez alleging multiple violations of state law, all based on the same underlying incident. The Tribal Court's Chief Judge issued an opinion finding that the Tribal Court had jurisdiction to prosecute Gutierrez. Gutierrez moved to dismiss the State indictment due to the State's lack of jurisdiction on the ground that the alleged crimes occurred on lands considered "Indian country" and within the jurisdiction of the United States.

Mexico, *United States v. Gutierrez*, Cr. No. 00-M-375, Dkt. No. 31 (D. N.M. Dec. 4, 2000).

In the February 2004 trial, Gutierrez's motion to dismiss for lack of State jurisdiction was granted, with the court finding that "the State does not have criminal jurisdiction over Indians within the exterior boundaries of the Pueblo of Pojoaque." App. 81 ¶ 11. On appeal by the State, the New Mexico Court of Appeals reversed. The Court interpreted the Pueblo Lands Act of 1924[2] and held that the State does have criminal jurisdiction over crimes committed by Indians on private fee simple land located within the exterior boundaries of Pueblo lands within the State of New Mexico.

In June 2006, the New Mexico Supreme Court reversed the New Mexico Court of Appeals. The New Mexico Supreme Court held that because of ongoing Federal superintendence and involvement over the lives of Pueblo Indians on all land – Pueblo-owned or privately held – within the exterior boundaries of the Pueblo, the State lacked criminal jurisdiction over Gutierrez. App. 22-23.

The New Mexico Supreme Court also properly concluded that privately held fee lands within the exterior boundaries of the Pueblo of Pojoaque are "Indian country" lands within the meaning of 18 U.S.C. § 1151(b) and further noted that the U.S. Congress has not acted to extinguish or otherwise change the Indian country status of such lands.

In fact, the opposite is true. The Indian Pueblo Land Act Amendments of 2005, 119 Stat. 2573 ("Pueblo Land Act Amendments of 2005"), evince clear congressional intent on the proper exercise of criminal jurisdiction on

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[2] *See* Act of June 7, 1924, chap. 331, 43 Stat. 636 ("Pueblo Lands Act of 1924").

lands within the exterior boundaries of Pueblo lands in the State of New Mexico.

SUMMARY OF ARGUMENT

The U.S. Congress has plenary authority over Indian Tribes and Indian affairs, including the Pueblos of New Mexico. The enactment of the Pueblo Land Act Amendments of 2005 affirmed the Congress' deliberated policy of protecting the Pueblos from the exercise of State criminal jurisdiction over Indian defendants within the exterior boundaries of the Pueblos. In light of the enactment of the Pueblo Land Act Amendments of 2005, the criminal jurisdiction issues giving rise to the New Mexico Supreme Court's decision are not capable of repetition and are not worthy of review by this Court.

REASONS FOR NOT GRANTING THE WRIT

I. CONGRESS ACTED WITH ALACRITY AND SPECIFICITY TO ELIMINATE AMBIGUITIES ABOUT CRIMINAL JURISDICTION BY ENACTING THE PUEBLO LAND ACT AMENDMENTS OF 2005.

The U.S. Congress has plenary authority over Indian tribes and Indian affairs, including the Pueblos of New Mexico. U.S. Const., Art. I, § 8, cl. 3; *see also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). In the 109th session of Congress (2005-2006), that body recognized the enormous potential for continued jurisdictional confusion created by various court decisions in the State of New Mexico concerning offenses committed by Indians on

land within the exterior boundaries of an Indian Pueblo. On July 26, 2005, the Pueblo Land Act Amendments of 2005 – the title of which reads, "An Act to amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction" – was considered and approved by the U.S. Senate. 151 Cong. Rec. S9,055 (daily ed. July 26, 2005). On December 6, 2005, the legislation was duly considered and approved by the U.S. House of Representatives. 151 Cong. Rec. H11,047 (daily ed. Dec. 6, 2005). On December 20, 2005, President George W. Bush signed the legislation into law.

Respondent Gutierrez asserts that the Pueblo Land Act Amendments of 2005 comport with both the congressional intent of the Pueblo Lands Act of 1924 and the New Mexico Supreme Court's decision in *State v. Romero*. The questions presented in this writ have been rendered moot by the enactment of the Pueblo Land Act Amendments of 2005, which affirmed the congressional policy of protecting the Indian Pueblos and their members from the exercise by the State of criminal jurisdiction over Indians within the exterior boundaries of the Pueblos.

II. FEDERAL POLICY REGARDING THE INDIAN PUEBLOS, AND SPECIFICALLY RELATING TO QUESTIONS OF JURISDICTION, HAS BEEN REPEATEDLY AFFIRMED BY THE U.S. CONGRESS.

Although the Territory and State of New Mexico established an entirely unsuccessful pattern of attempting to obviate Federal jurisdiction within the Indian Pueblos, congressional action and the decisions of this Court have established and recognized Congress' continued authority

over the Indian Pueblos and crimes conducted by Indians on lands within the boundaries of the Pueblos.

Decisions by the Territorial courts that were predicated on the nonexistence of Federal jurisdiction were superseded by express actions of the U.S. Congress. In 1904, the Supreme Court for the Territory of New Mexico held in *Territory v. Delinquent Tax Payers*, 76 P. 307 (N.M. 1904), that Pueblo lands were subject to local taxation. That decision was immediately followed by an act of Congress declaring the Pueblo lands exempt from taxation. Act of March 3, 1905, chap. 1479, 33 Stat. 1048, 1069. Congress, in adopting the New Mexico Enabling Act, 36 Stat. 557 (1910) ("Enabling Act"), perpetuated the exemption.

Similarly, in *United States v. Mares*, 88 P. 1128 (N.M. 1907), the Supreme Court of the Territory of New Mexico held that Pueblo Indians and their lands were not in the terms included under a Federal law that prohibited the sale of liquor to the Indians and the introduction of liquor into Indian country or trust allotments. *See* Act of January 30, 1897, chap. 109, 29 Stat. 506. That decision was also nullified when the Enabling Act became law in 1910.

The first legislature of the State of New Mexico also attempted to obviate the intent and effects of the Enabling Act when it requested that Congress modify the Enabling Act to allow State jurisdiction over Pueblo lands to allow taxation of the Pueblo lands and free grazing within Pueblo lands without Federal interference. *See* Requesting Congress to Modify the Law in Relation to Pueblo Indians, State of New Mexico House Joint Memorial No. 7 (June 5, 1912). Congress made no modifications to the Enabling Act.

In 1913, this Court rendered its decision in *United States v. Sandoval*, 231 U.S. 28 (1913), and confirmed the plenary authority of Congress over the Indian Pueblos. The Court noted:

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling.

Id. at 47. After a careful review of Indian decisions, the *Sandoval* Court found that:

> [I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

Id. at 46 (quoting *Tiger v. Western Invest. Co.*, 221 U.S. 286, 315 (1911)).

Congress subsequently passed the Pueblo Lands Act of 1924. In the Senate Report accompanying the legislation, Congress recognized that:

> [i]nasmuch as by the decision of the Supreme Court of the United States [in *Sandoval*] it was held that the United States was the guardian of these Indians, it seems to follow that if such guardian by reason of negligence has allowed the property of its wards to be lost there is at least a moral, if not a legal, obligation to make reasonable restitution for the loss suffered.

S. Rep. No. 492, 68th Cong., 1st Sess., at 8 (1924).

As cited by the New Mexico Supreme Court, Congress extensively considered criminal jurisdiction questions prior to passing the Pueblo Lands Act of 1924. *See* App. 26-27 ("There is no evidence that Congress has changed criminal jurisdiction within the exterior boundaries of any pueblo. In fact, the history of the Pueblo Lands Act [of 1924] irrefutably evinces congressional intent not to change criminal jurisdiction within the exterior boundaries of the pueblos."); *see also id.* at 27 ("The final version of the Pueblo Lands Act deleted this jurisdictional section [section 3, following] despite considerable debate.").

The hearing record developed by the U.S. House Committee on Indian Affairs in the 67th Congress regarding pending legislation is also illustrative:

> Mr. BURTNESS: I want to ask you about section 3 of the bill. That is the one that gives certain jurisdiction to the State of New Mexico and its courts. Why can not that be kept out of this?
>
> Colonel TWITCHELL: Section 3 refers to segregated areas. Under the compact with the United States all of the lands owned or held by the Pueblos has [*sic*] its jurisdiction surrendered to the Congress of the United States. If a bill is passed where certain lands are segregated, certainly the people

> of New Mexico have a right to be living in something besides an "Indian country."
>
> Mr. BURTNESS: There is no question about that. Is it necessary to have any legislation whatsoever for that purpose?
>
> Colonel TWITCHELL: I do not believe it is absolutely necessary, because I think that will happen as a matter of course; but I do believe that the more certain you can make the situation down there relievable, the better is [sic] will be.

H.R. 13452 and H.R. 13674, 67th Cong., 4th Session (Feb. 1-15, 1923).

In 1926, the State of New Mexico again attempted to obviate an act of Congress when it challenged the constitutionality of the Pueblo Lands Act of 1924. This Court rejected the State's contention holding that the general statutes of limitation of the State and Territory be held to run against the Indians up to the time of Statehood, and thereafter the statutes could not under any condition run against the Pueblo Indians because Congress reserved jurisdiction over the Pueblo Indians in the Enabling Act and excluded the Pueblo Indians from the jurisdiction of the state. *See United States v. Candeleria*, 271 U.S. 432 (1926). In light of the precedent of this Court, the State of New Mexico has no cause for complaint when Congress continues to exercise plenary authority over the Pueblo Indians through the enactment of the Pueblo Land Act Amendments of 2005.

The Pueblo Land Act Amendments of 2005 is a specific statute concerning criminal jurisdiction within Pueblo

lands, and it dominates the general provisions of 18 U.S.C. § 1151.[3] This Court has held that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." (citations omitted)); *see also Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (same); *Rodgers v. United States*, 185 U.S. 83, 86 (1902) ("The primary rule of statutory construction is, of course, to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used.").

Congress' intent in passing the Pueblo Land Act Amendments of 2005 is apparent in the title of the legislation: "An

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[3] *United States v. Arrieta*, 436 F.3d 1246 (10th Cir. 2006), *cert. denied*, 126 S.Ct. 2368 (2006), decided after the enactment of the 2005 amendments, is instructive in two respects. The defendant in that case committed a crime against an enrolled member of the Pueblo of Pojoaque on a public road within the exterior boundaries of the Pueblo. The road, surrounded on both sides by non-Indian owned land, was maintained by the county. In upholding the exercise of criminal jurisdiction by the United States, the Tenth Circuit held that the public road is "Indian country" within the meaning of 18 U.S.C. §1151 because the Pueblo is a "dependent Indian community." In so holding, the Tenth Circuit reasoned that (a) the Pueblo land includes all land on which the Pueblo resides as "set aside for use by the Indians as Indian land," and (b) the Pueblo community is one "under federal superintendence."

The second compelling aspect of *Arrieta* is that the defendant and the United States agreed that the Pueblo Land Act Amendments of 2005 do not apply retroactively to confer Federal criminal jurisdiction over the defendant. The Tenth Circuit did find, however, that "because the [Pueblo Land Act Amendments of 2005 are] consistent with the result we reach under prior law, we need not further consider the amendment." *Id.* at 1251.

Act To amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction." The explanatory statement to the legislation in the U.S. House of Representatives sheds further light on Congress' intent to clarify the allocation of criminal jurisdiction within the boundaries of Pueblo lands:

> Mr. RADANOVICH: . . . Mr. Speaker, S. 279, a bill sponsored by Senator Domenici, clarifies the uncertainty and potential law enforcement jurisdiction problems on all 19 Indian Pueblo reservations in the State of New Mexico.
>
> From 1913 to 2001, the United States Government prosecuted crimes committed by or against the New Mexico Pueblo Indians within the exterior boundaries of their reservation lands in the State of New Mexico. However, in 2001, a Federal judge, relying on a case about tribal jurisdiction in the State of Alaska, ruled that felonies committed by Indians on private lands within the boundaries of New Mexico Pueblos are not subject to Federal jurisdiction. The U.S. Attorney for New Mexico did not appeal the decision and, therefore, has failed to prosecute any felonies by or against Indians on these lands.
>
> At the same time that the Federal Government was declining to prosecute any felonies on Indian Pueblo lands, a New Mexico State court ruled that the State of New Mexico lacked jurisdiction to prosecute felonies committed by an Indian defendant against a non-Indian on private lands within the Pueblos. As a result, there is currently a large void in criminal jurisdiction at the Federal, State, and tribal levels.
>
> S. 279 corrects this void of jurisdiction by clarifying that, one, the United States will have jurisdiction over crimes defined under the Major

> Crimes Act committed by or against any Indian; two, the State of New Mexico will have jurisdiction clarified as to non-member Indians or non-Indians for all non-Major Crimes Act offenses; and, three, the New Mexico Pueblo governments will have jurisdiction over their individual members or other Indians for other offenses.
>
> S. 279 enjoys bipartisan support and has the support of the entire New Mexico delegation. I look forward to passing this necessary legislation and urge its timely enactment in this session.

151 Cong. Rec. H11,047 (daily ed. Dec. 6, 2005). As requested by the State of New Mexico, the congressional intent fulfills the State's expressed desire in its petition for certiorari that "jurisdictional tests should be clear, easy to apply and capable of producing predictable results."

Although this Court held in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), that "the term 'dependent Indian communities' is taken virtually verbatim from *Sandoval*," *id.* at 530, Congress clarified the unique status of the Pueblos by its subsequent amendment to the Pueblo Lands Act of 1924.

CONCLUSION

The Pueblo Land Act Amendments of 2005 constitutes a clear congressional directive regarding the allocation of criminal jurisdiction by Federal, State and Indian tribal governments within the exterior boundaries of the Pueblos of New Mexico. The Pueblo Land Act Amendments of 2005 clarified any remaining ambiguities with respect to criminal jurisdiction on Pueblo lands and ensures that the

jurisdictional issues giving rise to the case below are not capable of repetition. Respondent Matthew Gutierrez respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

FRANK A. DEMOLLI
Counsel of Record
JANA WERNER
PUEBLO OF POJOAQUE
LEGAL DEPARTMENT
58 Cities of Gold Road
Santa Fe, NM 87506
(505) 455-2272

PAUL G. MOOREHEAD
BRIAN L. GUNN
Of Counsel
DRINKER BIDDLE & REATH LLP
1301 K Street N.W.,
Suite 900 East
Washington, D.C. 20005
(202) 230-5000

Attorneys for Respondent Matthew Gutierrez